No. 77-1610

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In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES ALLAN ALMAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 565 F. 2d 927.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1978. A petition for rehearing and rehearing en banc was denied on March 13, 1978 (Pet. App. 12a).[1] Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 12, 1978 and the petition was filed on May 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioner filed his petition for rehearing jointly with Jesus Villareal and Abundio Martinez, who presented similar issues and whose petition for a writ of certiorari is pending (No. 77-6758).

QUESTIONS PRESENTED

1. Whether petitioner's encounter with Border Patrol officers constituted a seizure within the meaning of the Fourth Amendment, and, if so, whether the officer's actions were supported by reasonable suspicion.

STATEMENT

Following a jury-waived trial in the United States District Court for the Western District of Texas, petitioner Almand was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a five-year special parole term. The court of appeals affirmed, one judge dissenting (Pet. App. 1a-12a).

The evidence adduced at petitioner's suppression hearing established that at about 6:00 a.m. on January 22, 1976, a Border Patrol radio operator in Marfa, Texas, received a series of signals from sensor devices located along highways in the area indicating that a vehicle was traveling east on Highway 170 and then north through Big Bend National Park on Highway 385 (S. Tr. 12-14). The first group of sensors activated was located about seven miles from the Rio Grande River in a sparsely populated, unpatrolled area (S. Tr. 39, 20-21, 64). No other northbound traffic had been indicated since midnight (S. Tr. 22-24). The radio operator notified Border Patrolman Wilson in Alpine, Texas, who, suspecting the possibility of alien smuggling[2], set out with another officer to investigate (S. Tr. 50, 72). As the two officers were driving south between Marathon, Texas, and

[2]Another officer testified at the hearing that 288 illegal aliens were apprehended in the same general area between September 1 and December 31, 1975 (S. Tr. 27).

the northern entrance to the National Park, they were notified by the radio operator that the last sensor activated, No. 317, was about 35 miles south of Marathon and that the sensors north of that point had not been activated, indicating that the vehicle had stopped or turned off the road (S. Tr. 50).

As the patrolmen approached the area of sensor No. 317, they saw a camper truck with Georgia license plates parked on the east side of the road facing south (S. Tr. 55). They saw no one in the cab, but Officer Wilson felt the front grill of the truck, found that it was warm despite the 22° F. outside temperature, and concluded that the vehicle had very recently been driven (S. Tr. 56, 57). Believing that this was the vehicle that had been traveling north from the border area (since no sensors north of that point had recently been activated), Officer Wilson knocked on the back door of the camper (S. Tr. 57). After several minutes petitioner opened the door and stepped out. The officers observed that he had a black eye, a large bruise on one hand and a cut under one ear (S. Tr. 58, 59). The officers identified themselves, asked petitioner where he was from and where he was going, and generally engaged in "small talk about the chilly weather and sunrise" (S. Tr. 59). In response, petitioner told the officers that he had been born in Georgia, was travelling south from Midland, Texas, and had been parked in that spot for about two hours (S. Tr. 59-60). The officer then asked petitioner if he would mind if the officers looked inside the camper (S. Tr. 60). Officer Wilson testified that petitioner said "no" and that when Officer Wilson discovered the door to be locked, petitioner took his key from his pocket and opened the door (S. Tr. 60-61). Officer Wilson entered the camper and saw a large mound in the center of the floor covered with a blanket. He removed the blanket and saw several large plastic bags. He testified that the bags "felt familiar

to me, so I pierced the plastic" (S. Tr. 61). Officer Wilson detected an ordor of marijuana, and arrested petitioner (S. Tr. 61).

Although petitioner testified that he did not consent to the search of the camper and that he unlocked it at gun point (S. Tr. 138), the district court specifically discredited his testimony "where it diverged from the officers', because Almand became nervous and his testimony lost spontaneity and was self-contradictory and inconsistent" (Pet. App. 6a).

The district court denied the suppression motion, and the court of appeals affirmed (Pet. App. 1a-8a). Although the court held that the encounter constituted an investigatory stop "when Almand stepped out of the rear of the camper into the officers' presence" (*id.* at 4a), it held that the stop was based on reasonable suspicion (*id.* at 6a). The court also affirmed the district court's finding that petitioner consented to the subsequent search of his camper (*id.* at 6a-8a).

ARGUMENT

The courts below correctly denied the motion to suppress because (1) the encounter was not a stop, and (2) even if it was a stop, it was supported by reasonable suspicion.

1. Not every encounter between the police and a citizen is a stop or an arrest. As the Court said in *Terry* v. *Ohio*, 392 U.S. 1, 19, n. 16:

> Obviously, not all personal intercourse between policemen and citizens involve "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we concluded that a "seizure" has occurred.

And under principles recently reaffirmed in *Scott* v. *United States*, No. 76-6767, decided May 15, 1978, slip op. 8-9, the determination whether there has been a stop or arrest does not turn on the subjective purposes of the officers or the subjective apprehensions of the citizen, but upon objective circumstances that would lead a reasonable man to conclude that his liberty was being restrained in a significant manner. See also *Lowe* v. *United States*, 407 F. 2d 1391, 1397 (C.A. 9); *Fuller* v. *United States*, 407 F. 2d 1199, 1208, n. 11 (C.A. D.C.), certiorari denied, 393 U.S. 1120).[3] All that the record establishes in this case is that the officers knocked on the door of a vehicle parked by the side of the road and subsequently engaged the occupant in ordinary conversation. To hold that this kind of enounter is a "seizure" requiring reasonable suspicion of criminal activity would come close to holding that every police-citizen encounter is a "seizure," and erroneously suggests that it is inappropriate for the police simply to check out an apparently empty vehicle parked in a remote area if they have no specific suspicion of criminal activity.[4]

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[3]There is no testimony in the record indicating what the officers might have done if petitioner had attempted to depart, and the foregoing authorities establish that such testimony would not be controlling in any event.

Of course whenever a policeman encounters a citizen and engages him in conversation, ordinary standards of conduct and courtesy would usually inhibit the person from ignoring the policeman and proceeding on his way. But that kind of inhibition is clearly not what this Court meant in *Terry* by a "restrain[t] [on] the liberty of a citizen" sufficient to constitute a Fourth Amendment seizure; otherwise almost every police-citizen encounter would be a seizure.

[4]Of course, there may be circumstances in which the questioning of a person who was in a parked vehicle would amount to a seizure if, for example, he was ordered to exit from the vehicle at gun point. But the district court specifically credited the officers' testimony concerning the encounter in this case.

b. Even if this encounter rises to the level of a stop, it was not unlawful. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885, n. 10, this Court held that whether border patrol agents are justified in stopping a car depends "on the totality of the particular circumstances" and identified a number of illustrative but not exclusive factors bearing on that issue, including (422 U.S. at 884-885): "the characteristics of the area," "[i]ts proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic," "information about recent illegal border crossings in the area," "[t]he driver's behavior," and "[a]spects of the vehicle."

All of these considerations justified the officers' limited actions in this case. To reiterate, the officers knew that there was only one vehicle travelling north at that early morning hour, which, in their experience, was a "prime time" for illegal alien traffic (S. Tr. 39); that it was travelling in a sparsely populated area in which almost 300 illegal aliens had been arrested in the preceding four months; that the vehicle had come from very close to the Mexican border; and that it had stopped or turned off Highway 385 north of sensor 317. North of sensor 317 they encountered a parked camper whose engine was still warm; it was facing south, although no sensor activity had indicated recent southbound traffic in that vicinity (S. Tr. 15, 23, 40-41). In sum, the court of appeals correctly held that the "totality of the particular circumstances" supported the stop in this case, if it was a stop, and that finding does not warrant this Court's review.[5]

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[5]Contrary to Judge Wisdom's view in dissent (Pet. App. 8a-12a), the majority below correctly distinguished the earlier decision in *United States* v. *Frisbie*, 550 F. 2d 335 (C.A. 5). First, the officers in *Frisbie* stopped a moving vehicle. Even if the encounter in this case is deemed to be a stop, the intrusion is significantly less than in the case of the stop in *Frisbie*. As this Court recognized in *Terry*, the grounds necessary to justify an intrusion vary with the degree of intrusion (see 392 U.S. 13-20); this view is inherent in the Fourth Amendment's standard of reasonableness. Second, the vehicle in this case was parked facing south, although the officers had reason to believe the only car on the road was travelling north. It was not unreasonable for the agents to find that circumstance suspicious. In any event, alleged intra-circuit conflicts are matters for the court of appeals itself to resolve. *Wisniewski* v. *United States*, 353 U.S. 901.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Petitioner does not challenge the lower courts' finding that he voluntarily consented to the subsequent search of his camper. His arguments imply that the search was a fruit of the allegedly illegal stop notwithstanding his consent to the search. Therefore if the Court agrees with our contention that the antecedent encounter was not illegal, there would be no occasion to consider the consent issue.

We submit that even if the antecedent encounter were regarded as a stop without founded suspicion, the record establishes a consent sufficient to dissipate the taint under principles established in cases such as *Brown* v. *Illinois*, 422 U.S. 590 and *Wong Sun* v. *United States*, 371 U.S. 471. See also *United States* v. *Watson*, 423 U.S. 411, 425 (Powell, J., concurring). The encounter and consent in this case are very similar to the encounter and consent held to be valid in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 220. *Schneckloth* involved no antecedent illegality, and thus no fruits question, and *Brown* v. *Illinois* would suggest that consent alone would not dissipate the taint of a prior illegality. But here the antecedent encounter, if it was unlawful, was so only in the most technical sense: certainly the misconduct, if any, was hardly "purposeful or flagrant" (see 422 U.S. at 604), and any illegality involved cannot reasonably be regarded as having affected petitioner's decision to permit the inspection of his vehicle.

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